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Blood Grouping Tests in Evidence

EVIDENCE

BLOOD-GROUPING TESTS IN EVIDENCE

Plaintiff sued defendant for maintenance of her child alleging that defendant was the father. The defendant denied paternity and secured a court order requiring the plaintiff and child to submit to blood-grouping tests for comparison with defendant's blood. Order affirmed. By authority of Fed. Rules Proc. 35 (a) the court may order blood tests since blood-grouping is a part of physical condition.[1]

It is accepted by medical authorities that blood-grouping tests can in certain cases disprove parentage.[2] But, the tests can be used only negatively; i.e., to show non-parentage.[3] When the blood groups of one parent and the child are known, the blood group of the unknown parent must fall into certain classes. If the putative parent's blood does not come within one of these classes he is excluded from possible parentage, but if it does come within one of the classes he, among the thousands of others in that class, might be the parent. With use of the latest tests the average chances of ascertaining non-paternity are about one in three.[4]

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[14] This procedure was approved in State *ex rel* Board of Comm'rs of Allen Co. v. Miller, 107 Ind. 39, 7 N.E. 758 (1886), where a statute similar to IND. STAT. ANN. (Burns 1933) §2-1417 was followed and the attorney's compensation allowed like other costs.

[1] Beach v. Beach, 114 F (2d) 479 (App. D.C. 1940). Rule 35 (a) FED. RULES CIV. PROC. provides, "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician."

[2] No authority today disputes the fundamental doctrines of blood-grouping. There may be scientific controversies over advances and refinements that have no application here. Wiener, *Determining Parentage* (1935) 40 Scientific Mo. 324; Landsteiner, *Forensic Application of the Serologic Individuality Tests*, Jour. of Amer. Med. Assn. (Oct. 6, 1934) 1041; 1 WIGMORE, EVIDENCE (3d ed. 1940) § 165a.

[3] Flippen v. Meinhold, 156 Misc. 451, 282 N.Y. Supp. 444 (N.Y. City Cts. 1935) (Plaintiff's request for blood test to obtain further proof of defendants paternity refused).

[4] In 1900 Landsteiner recognized the existence of four basic blood-groups—O, A, B and AB. In 1927 Landsteiner and Levine reported two additional groups, M and N. By using both tests

The courts of the United States have been slow to utilize blood tests in evidence.[5] Their value and the court's power to order that such tests be made has been raised, with varying results, in civil actions for non-support,[6] carnal assault,[7] fornication and bastardy proceedings,[8] probate proceedings,[9] and in criminal prosecutions for rape.[10] The reliability of the tests has been questioned by some court.[11] It seems, however, that if the courts had been more fully advised as to the complete acceptance in medical circles of the validity of the tests a different result might have been reached.[12] The tests have been used in over 70 unreported[13] and 6 reported cases.[14] Four states have passed legislation authorizing the tests.[15] In view of the unanimous endorsement by the medical profession, it seems likely that a growing number of courts will admit the evidence wherever relevant if the

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the number of cases which can be solved is doubled. Hooker and Boyd, *Blood-grouping as Tests of Non-Paternity* (1934), 25 J. Crim. L. 195.

[5] The first reported case in this country, Commonwealth v. Zammarelli, 17 Pa. D & C. 229 (1931) was some seven years later than the first cases in the Continental countries. To date, fourteen states have considered the tests either in decisions or legislation: Calif., Conn., Ill., Md., Mass., Mich., Mont., N.J., N.Y., Ohio, Ore., Pa., Texas, and Wis. Galton, *Blood-Grouping Tests and Their Relationship to the Law* (1938) 17 Ore. L. Rev. 177, 185.

[6] *In re* Lentz, 247 App. Div. 31, 283 N.Y. Supp. 749 (1935) (entitled to blood grouping test under statute).

[7] Beuschel v. Manowitz, 241 App. Div. 888, 272 N.Y. Supp. 165 (1934) (Order for blood test denied on the ground of lack of power to compel submission to the test.) New York now permits the order by statute. N.Y. CIVIL PRACTICE ACT (1939) § 306 a.

[8] Commonwealth v. English, 123 Pa. Super 161, 186 Atl. 298 (1936) (order denied because of lack of power to compel submission to the test); *cf.* Commonwealth v. Visocki, 23 Pa. D. & C. 103 (1935).

[9] *In re* Swahn's Will, 158 Misc. 17, 285 N.Y. Supp, 234 (1936) (Order denied because husband was not a party to action under § 306a of the N.Y. CIVIL PRACTICE ACT).

[10] State v. Damm, 62 S. D. 123, 252 N.W. 7 (1933) (Court upon rehearing admitted reliability of the tests, but would not reverse previous holding because defense did not present sufficient evidence at the time of trial). State v. Damm, 64 S.D. 309, 266 N.W. 667 (1933).

[11] Commonwealth v. English, 123 Pa. Super 161, 186 Atl. 298 (1936); State v. Damm, 64 S. D. 309, 266 N.W. 667 (1933).

[12] See note 10 *supra.*

[13] Cases are collected in Galten, *Blood-Grouping Tests and Their Relationship to the Law* (1938) 17 Ore. L. Rev. 177.

[14] Arais v. Kalesnikoff, 67 P. (2d) 1059 (Cal. App. 1937), qualified in 10 Cal. (2d) 428, 74 P. (2d) 1043 (1938); State *ex rel.* Slovak v. Holod, 63 Ohio App. 16, 24 N.E. (2d) 962 (1939); State v. Wright, 59 Ohio App. 191, 17 N.E. (2d) 428 (1938); *In re* Lentz, 247 App. Div. 31, 283 N.Y. Supp. 749 (1935); Commonwealth v. Zammarelli, 17 Pa. Dist. & Co. R. 229 (1931); Commonwealth *ex rel.* Visocki, 23 Pa. Dist. & Co. R. 103 (1935).

[15] New Jersey, Laws N.J. 1939, c. 221; NEW YORK, CIVIL PRACTICE ACT (1939) § 306a; OHIO GEN. CODE (Supp. 1940) § 12122-1, 12 122-2; WIS. STAT. (1937) § 32 5:23, 166.105.

available material on the probative value is adequately presented.

Conflict exists over the evidentiory weight to be given to the tests. Some jurisdictions consider the tests inconclusive and to be merely scientific fact the relative weight of which must be determined by the trial judge or jury.[16] In another case the jury found the defendant guilty of bastardy despite expert testimony that blood tests proved defendant could not be the father. The decision was reversed because of the contrary uncontroverted testimony based on scientific knowledge.[17] The latter position seems better. Either the tests are valid or they are not. Once their reliability is accepted, and nonparentage is shown, the result should be conclusive.[18] To conclude that the tests are valid and then allow a sympathetic jury to override such evidence is to take away much of the value of the tests.

Another difficulty in cases involving blood tests has been in the court's power to order parties to submit to such tests.[19] The court in the principal case solves this difficulty by concluding that blood tests come within the classification of physical examinations. Since Fed. Rule Civ. Proc. 35 (a) authorizes the courts to order physical examinations[20] it could order blood tests. The plaintiff's child was considered to be a party to the action and would, therefore, come within the rule.

The court's power to order blood tests thus seems restricted by the same limitations as exist in ordering physical examinations in personal injury actions. The prevailing view recognizes an inherent power in the court to order physical examinations in the latter situation.[21] Thus courts which follow that view should find little difficulty

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[16] Arais v. Kalesnikoff, 10 Cal. (2d) 428, 74 P. (2d) 1043 (1937); State *ex rel.* Slovak v. Holod, 63 Ohio App. 16, 24 N.E. (2d) 962 (1939). *cf.* State v. Wright, 59 Ohio App. 197, 17 N.E. (2d) 428 (1938).

[17] Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931).

[18] " . . . no two blood experts could possibly disagree as to the results of a blood test, for there only two possibilities: agglutination ("clumping..) either occurs, or it does not occur; there are no halfway responses." Britt, *Blood-Grouping Tests and the Law* (1937) 21 Minn. L. Rev. 671, 693.

[19] Beuschel v. Manowitz, 241 App. Div. 888, 272 N.Y. Supp. 165 (1934); Commonwealth v. English, 123 Pa. Super. 161, 186 Atl. 298 (1936).

[20] Sibbach v. Wilson Co., 9 U.S.L. Week 4131 (U.S. 1941) (Upholding validity of rule 35(a)).

[21] Cook v. Miller, 103 Conn. 267, 130 Atl. 571 (1925); S. Bend v. Turner, 156 Ind. 418, 60 N.E. 271 (1901); Howard v. Hartford Acc. & Ind. Co., 139 Kan. 403, 32 P. (2d) 231 (1934); Graves v. Battle Creek, 95 Mich. 266, 54 N.W. 757 (1893). A few courts have distinguished between civil and criminal actions in this matter. Austin & N.W. R.R. v. Cluck, 97 Tex. 172, 77 S.W. 403 (1903). A reason sometimes offered is that the court has no means by which it could enforce an order for physical examinations. Civil actions can be stayed until the plaintiff submits to an examination, but in criminal cases the trial is between the state and the defendant and trial cannot be stayed until the complaining witness complies with the order. State v. Allen, 128 Wash. 217, 222 Pac. 502 (1924). The answer to this objection lies in the contempt powers of the court. 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2220.

in ordering blood tests.[22] The need for blood tests in paternity and similar proceedings seems greater than the need for medical examination in personal injury suits.

The minority view which obtained in a few states[23] and in the federal courts,[24] until the new rules of procedure, denied the power to order physical examination, apparently because of lack of precedent and a desire to protect plaintiff's right of privacy.[25] The reasons have been rejected by most courts and commentators;[26] but courts following the minority view will probably refuse to order blood tests without a statute or court rule as authority. J.R.D.

EVIDENCE SHOWING ABSENCE OF MOTIVE

Pollard was charged with conspiracy to commit perjury by having witnesses falsely testify that they saw the deceased execute a note upon which Pollard founded a claim against the deceased's estate. The lower court excluded evidence that the note was genuine. Held, the exclusion was reversable error. The evidence was competent as tending to establish that no motive for the crime alleged existed. *Pollard v. State*, 29 N.E. (2d) 956 (Ind. 1940.)

Where direct evidence is in conflict as to whether the accused committed a crime, or the evidence is circumstantial upon that issue, motive is material. *Hardin v. State*, 211 Ala. 656, 101 So. 442 (1924); *People v. Lewis*, 275 N. Y. 33, 9 N. E. (2d) 765 (1937). In such cases, evidence tending to substantiate the existence or nonexistence of motive is relevant and admissible as circumstantially bearing upon the intent or identity of the offender. *People v. Durkin*, 330 Ill. 394, 161 N. E. 739 (1928); *Hall v. State*, 37 Okla. Cr. 4, 255 Pac. 716 (1927). The relevancy of facts so adduced hinges upon the general character of the motive prompting the crime. 2 WIGMORE, EVIDENCE (3d ed. 1940) §§ 389-392. The fact submitted, however, must be within the probable knowledge of the accused since it otherwise could not have effected his motives. *Potter v. State*, 60 N. D. 183, 233 N. W. 650 (1930); *Marabile v. State*, 89 Ga. 425, 15 S. E. 453 (1892) (apparent oportunity to know); *cf. Cheek v. State*, 35 Ind. 492 (1871) (actual knowledge). The basis for the admission of this kind of evidence is

[22] Indiana follows the majority view. South Bend v. Turner, 156 Ind. 418, 60 N.E. 271 (1901). From the language used there it seems very unlikely that Indiana courts would refuse to order blood tests.

[23] Richardson v. Nelson, 221 Ill. 254, 77 N.E. 583 (1906); Stack v. N.Y., N.H. & Hartford R.R., 177 Mass. 155, 58 N.E. 686 (1900).

[24] Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891). Subsequent to the decision in the principal case the Supreme Court in Sibbach v. Wilson Co., 9 U.S.L. Week 4131 (U.S. 1941), cited *supra* note 20, held that to compel a party to submit to physical examination is not an invasion of a substantive right and, therefore, federal rule 35(a) does not transcend the enabling act.

[25] Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891).

[26] See cases cited *supra* note 15; 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2220.